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FILE:

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Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann

2 Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software systems development firm. It seeks to employ the beneficiary permanently in the United States as a database administrator pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to aliens of exceptional ability and members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the job offered did not require an alien of exceptional ability.

On appeal, counsel asserts that the minimum job requirements should not reflect on the beneficiary's own qualifications. Counsel misunderstands the basis of denial. The director did not reach whether or not the beneficiary is an alien of exceptional ability. Rather, the director concluded only that the job did not require an individual of exceptional ability. For the reasons discussed below, that conclusion is a valid basis of denial supported by the plain language of the regulation at 8 C.F.R. § 204.5(k)(4), which is binding on us.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

(i) **General.** Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.**

(Bold emphasis added.) While the director failed to cite this regulation, it provides the legal basis for his ultimate conclusion.

In his initial cover letter, counsel acknowledges that the job offer requirements are relevant. Specifically, he states that although the beneficiary qualifies as an advanced degree professional based on his Master's degree and twenty years of experience, "the labor certification by itself will not support an EB-2 petition." As explanation, counsel concedes that the "normal requirements for a Database Administrator do not exceed a Bachelor's degree and two to less than four years of experience according to Department of Labor guidelines." Counsel provides no explanation, however, for the implication that while the job offer for an advanced degree professional must require an advanced degree professional, the job offer for an alien of exceptional ability need not do so. The regulation at 8 C.F.R. § 204.5(k)(4) makes no such distinction.

On appeal, counsel reiterates the evidence submitted to establish that the beneficiary is an alien of exceptional ability. Counsel continues: "The minimum requirements for the job may be one relevant factor among many in making a determination of 'exceptional ability,' but it must be balanced against all of the evidence and should be given little weight, if any." As stated above, however, the director did not reach the issue of the beneficiary's eligibility for that classification. Specifically, the director's determination that the job offered does not require an individual of exceptional ability is a ground of denial in and of itself and not simply a basis for questioning the beneficiary's own qualifications. Counsel then asserts that if the labor certification required additional experience it would require an advanced degree professional. Thus, counsel concludes that "the statute providing for 'exceptional ability' already assumes that the minimum requirements stated in the labor certification are less than five years of experience or a Master's degree." We note that the exceptional ability classification is not limited to professional positions. Significantly, section 203(b)(3) of the Act covers professional positions that do not require an advanced degree. Given this explicit category for professional positions that do not require advanced degrees, we cannot conclude that the exceptional ability classification was designed for professional positions that require less than an advanced degree.

The fact that a database administrator position cannot support the alien of exceptional ability classification in no way obligates us to waive the requirements of 8 C.F.R. § 204.5(k)(4). Congress provided several classifications and the law does not suggest that every position must be able to support the exceptional ability classification. As stated above, the law provides a classification for professional positions that do not require an advanced degree. Section 203(b)(3) of the Act. In his initial cover letter, counsel asserts that the petitioner is only seeking classification under section 203(b)(2) of the Act because the beneficiary's son will be unable to receive immigration benefits through the beneficiary if this lower classification is granted. While the petitioner's intention is understandable, it does not convert the job from a professional position to an exceptional ability position.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

This denial is without prejudice to the filing of a new petition under a lesser classification.

ORDER: The appeal is dismissed.